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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 734

MARY FLAGLER CARY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 735

HARRY HARKNESS FLAGLER, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 736

ESTATE OF ANNIE L. FLAGLER, DECEASED, HARRY HARKNESS FLAGLER, EXECUTOR, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

295279—41

No. 737

JEAN LOUISE MATTHEWS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of writs of certiorari in these cases.

The question presented in these cases is whether under Section 113 (a) (5) of the Revenue Acts of 1934 and 1936 the proper basis for measuring the gain or loss from the sale in 1934 and 1936 of certain shares of stock is the fair market value (1) as of the date in May 1923, when the stock was distributed to the taxpayers by trustees of a testamentary trust, or (2), as of the date of the testator's death on May 20, 1913.

The Board of Tax Appeals sustained the Commissioner's contention that the proper basis was the fair market value of the stock on the date of the death of the testator, and its decision was affirmed *per curiam* by the Circuit Court of Appeals for the Second Circuit upon the authority of its earlier decision in *Van Vranken* v. *Helvering*, 115 F. (2d) 709. The petition for writs of certiorari in these cases asserts (Pet. 6–7) that the holding of the Cir-

cuit Court of Appeals is in conflict with *Reynolds* v. *Commissioner*, 114 F. (2d) 804 (C. C. A. 4th). We agree that there is a substantial conflict between these cases. The Government has filed a petition for certiorari in the *Reynolds* case, No. 684, present Term, in which there is alleged a conflict with the *Van Vranken* case.[1]

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

FEBRUARY 1941.

[1] If the question in the present cases should turn, contrary to our contention, upon whether the interests of the taxpayers under the testamentary trust were "vested" or "contingent," we wish to reserve the right to make the contention that their interests were vested rather than contingent.

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